IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

U.S. AXMINSTER, INC.
Plaintiff

V. NO. 4:95CV351-B-B

DIRECTIONS IN DESIGN, INC.
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the plaintiff's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff, U.S. Axminster ("USAX"), manufactures carpet. The defendant, Directions in Design ("DID"), is an interior design company. Over the years, the parties have entered into numerous contracts for the manufacture and sale of custom carpet. In 1995, the plaintiff filed this action to recover the outstanding balance allegedly owed on several of the contracts. The parties have settled all of the disputed issues with the exception of the balance due on two invoices involving the Grand Palais Casino project.

Prior to September 2, 1994, USAX provided DID with carpet samples for the Grand Palais Casino. The samples are called "strike-offs", and the defendant was required to sign the backs of the samples which it chose to order. Once DID signed the strike-offs, the plaintiff had a copyright interest in the pattern

exhibited on the sample, and the defendants could not obtain that pattern from any other manufacturer.

On September 2, 1994, DID submitted purchase orders number 4269 and 4270 for carpet to be used in the Grand Palais Casinos. USAX asserts that the defendant still owes a balance of $110,261.56 for the Grand Palais Casino carpet. DID does not dispute the balance due, but claims that payment of the balance is conditioned upon the defendant receiving payment for the carpet from Grand Palais Casino, which has yet to occur.

The purchase orders submitted by the defendant on September 2nd contained payment terms of "net 60 days." On September 16th, George Duffee-Braun, vice-president of USAX, sent a letter to David Ganz, president of DID, which stated that payment terms for orders with USAX were 50% deposit, net 30 days after delivery. On September 23, Ganz sent a return letter to Duffee-Braun which stated in relevant part as follows:

> I am in receipt of your letter dated September 16, 1994. Mr. Silver (president of USAX) called me on September 22, 1994, with essentially the same information. While we are discouraged and frustrated by the possible loss of business for both our companies, we certainly respect your right to establish terms and conditions for U.S. Axminster, Inc. As I told Sam, we should have a final decision on Grand Palais by September 30th.

The defendant asserts that the payment terms reflected in the September 16th letter were rejected by Ganz's letter of September 23rd. However, there is no language in the September 23rd letter which even remotely rejects or modifies the payment terms requested by the plaintiff. On or about September 27th, DID remitted to the

plaintiff a check for $152,005.77, representing the required 50% deposit on purchase orders 4269 and 4270.

USAX sent two confirming memoranda to DID on October 25, 1994, which contained the carpet specifications for purchase orders 4269 and 4270, as well as a document entitled "Terms and Conditions of Sale." This document stated under the heading "Terms of Payment" that all custom orders required a deposit with receipt of the order, with the balance due net 30 days from the date of invoice. The document further stated under the heading "Entire Agreement" that "[t]he terms and conditions set forth herein shall be the sole agreement governing the rights and obligations of the customer and U.S. Axminster, and any changes or modifications shall be invalid unless set forth in writing and executed by duly authorized officers or agents of each party." DID notified the plaintiff of two errors contained in the confirming memoranda, but failed to object to the terms and conditions of sale. The plaintiff sent revised confirming memoranda on November 1, with another copy of the "Terms and Conditions of Sale" attached. The defendant again failed to object to the terms of the sale.

The plaintiff manufactured the carpet as requested by the defendant and delivered the carpet over the course of two months. With each of the fourteen deliveries, the plaintiff sent a separate invoice to the defendant. Each invoice reflected the pro rata share of the deposit applied to the carpet being delivered, and stated that the balance was due in 30 days. Not once did the

defendant protest that payment of the balance was conditioned upon DID receiving payment from Grand Palais Casino.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The court must first determine whether the parties' writings were intended to, and do, constitute a complete integration of the parties' agreement. Walley v. Bay Petroleum Corp., 312 F.2d 540, 544 (5th Cir. 1963). The court may look to extrinsic evidence, as the parol evidence rule is inapplicable to this initial determination. Id. If the terms of the written agreement are not intended to be the exclusive statement of the agreement, parol evidence may be used to bring the entire contract before the court.

In reviewing the undisputed written evidence, the court finds as a matter of law that the writings were intended to, and did in fact, constitute a complete integration of the parties' agreement. The defendant had numerous opportunities to reject the written payment terms set forth by the plaintiff, but DID failed to do so. The "Terms and Conditions of Sale" specifically stated under the heading "Entire Agreement" that the terms and conditions contained therein were the sole agreement of the parties, and could not be modified unless set forth in writing. The court finds no evidence to support the defendant's contention that the writings did not reflect the parties' final agreement.

The defendant asserts that the terms and conditions set forth in the plaintiff's confirming memoranda rarely, if ever, reflected the parties' final agreement. DID asserts that prior course of dealing between the parties, wherein the plaintiff allegedly waived the deposit requirement, failed to enforce the "net 30 days" payment term, and/or orally modified the terms of the agreement, serves to confirm that the written agreement was not intended to be

the final agreement of the parties. The defendant cites two specific examples of alleged oral modifications to previous agreements, both of which involved the plaintiff waiving the 50% deposit and the defendant extending the deadline for shipping the carpet. However, the fact that the parties did not enforce the terms of a prior agreement does not mean that those were terms were not a final expression of the parties' agreement. While historical treatment may create an expectation as to future treatment, prior conduct cannot change the express terms of the written agreement. Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 136 (5th Cir. 1979), cert. denied, 444 U.S. 938, 62 L. Ed. 2d 198 (1979).

The defendant's assertion that payment from DID was conditioned upon its receipt of payment from Grand Palais Casino is based upon an alleged oral agreement reached between Ganz and Silver sometime between September 23rd and September 27th. However, the defendant failed to memorialize in writing the alleged oral agreement concerning conditional payment. Since the court has found that the writings constitute a complete integration of the final agreement of the parties, parol evidence regarding prior or contemporaneous oral agreements is inadmissible to modify the terms of the written agreement. Smith v. Falke, 474 So. 2d 1044, 1046 (Miss. 1985); Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927).

The defendant further contends that evidence of the alleged oral agreement concerning conditional payment may be admissible through a statutory provision which allows prior course of dealing

to be admitted for the purpose of explaining or supplementing the terms of the written agreement. Miss. Code Ann. § 75-2-202 (1972).[1] However, the defendant's attempt to introduce the alleged oral agreement through § 75-2-202 fails in two respects. First, the defendant has failed to cite any instances of prior course of dealing in which the parties agreed that final payment from DID would be conditioned upon its receipt of payment from its customer. Second, the statute specifically provides that the terms of the written agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. An alleged agreement wherein the defendant's duty to pay is conditioned upon receipt of payment from its customer is clearly contradictory to the payment terms of "net 30 days" after invoice. It is quite a stretch to assert that the alleged oral agreement merely explains or supplements the payment terms set forth in writing.

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[1] Miss. Code Ann § 75-2-202 (1972) provides that:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade or by course of performance; and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Finally, DID asserts that a letter sent on November 21, 1994, from Toni Condello, credit manager for USAX, to Roger Miller, vice-president and chief financial officer of DID, proves that the plaintiff understood that payment from the defendant was contingent upon DID receiving payment from Grand Palais Casino. The letter states "I realize that you were told not to pay USAX until you were paid from your customer, however we billed DID and not your client." This letter fails to establish that USAX had agreed to allow the defendant to withhold final payment until receiving payment from Grand Palais Casino. The letter does not indicate who told Miller not to pay USAX, and from the language in the letter it appears much more likely that it was one of Miller's superiors, such as David Ganz, rather than a representative of USAX, who told Miller not to pay the plaintiff.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the _____ day of October, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE